PUBLIC PROSECUTOR v. LAI SIEN KON

[R.Cr.J. (Ajaib Singh J.) July 12, 1977]
[Seremban — Criminal Revision No. 3 of 1977]

Criminal Law and Procedure — Criminal revision — Accused charged and convicted for, inter alia, corruptly offering a gratification of $29 to a constable — Fined $500 in default four months' imprisonment and $29 in default one week's imprisonment — Scope of Prevention of Corruption Act, 1961, s. 13 — Criminal Procedure Code (F.M.S. Cap. 6), s. 283 — Entertainments Duty Rules, 1953, r. 8(3).

Bribery and Corruption — Offering gratification — Prevention of Corruption Act, 1961, s. 13

The accused was charged and convicted on two counts: (1) that he resold 17 cinema tickets which is an offence under rule 8(3) of the Entertainments Duty Rules, 1953 and (2) that he corruptly offered a gratification of $29 to a police constable as an inducement for forbearing to take action against the accused under the Entertainments Duty Rules, an offence under section 4(b) of the Prevention of Corruption Act, 1961 (hereinafter called the Act). On the first charge he was fined $200 in default one month's imprisonment. On the second charge he was fined $500 in default four months' imprisonment and in addition he was ordered to pay $29 to the Government in default one week's imprisonment. The order to pay $29 was made under section 13 of the Act.

Held: (1) section 13 of the Act is restrictive in its scope and it can apply only where a person is convicted of an offence committed by the *acceptance* of any gratification in contravention of any provision of the Act. In this case however the accused was convicted of offering gratification and therefore the provisions of section 13 were irrelevant and inapplicable;

(2) in any event the penalty ordered under section 13 of the Act is to be treated as a fine only to the extent and for the purpose of its recovery and is not to be treated as a fine in default of which a term of imprisonment may be imposed.

Case referred to:-

(1) *Lee Mun Foong* v. *Public Prosecutor* [1976] 2 M.L.J. 16.

CRIMINAL REVISION.

Razalli bin Hassan (Deputy Public Prosecutor) for the Public Prosecutor.

Accused in person.

Ajaib Singh J.: The accused in this case was charged in the Sessions Court on two counts. First that he resold 17 cinema tickets which is an offence under rule 8(3) of The Entertainments Duty Rules, 1953 and secondly that he corruptly offered a gratification to wit $29 to a police constable as an inducement for forbearing to do an act in relation to his principal's affairs namely refraining from taking action against the accused under The Entertainments Duty Rules, an offence under section 4(b) of the Prevention of Corruption Act, 1961.

The accused was convicted on both charges on his own plea of guilty. On the first charge he was fined $200 in default one month's imprisonment. On the second charge he was fined $500 in default four months' imprisonment and in addition he was ordered to pay $29 to the Government of Malaysia in default one week's imprisonment. The order to pay $29 to the Government was made under section 13 of the Prevention of Corruption Act which reads as follows —

"Where a court convicts any person of an offence committed by the acceptance of any gratification in contravention of any provision of this Act, then, if that gratification is a sum of money or if the value of that gratification can be assessed, the court shall, in addition to imposing on that person any other punishment, order him to pay as a penalty, within the time and to the body and in the manner specified in the order, a sum which is equal to the amount of that gratification or is, in the opinion of the court, the value of that gratification, and any such penalty shall be recoverable as a fine."

The provisions of section 13 are mandatory. They provide for the imposition of an additional punishment by way of a penalty but it is quite clear from the wording of this section that the penalty may be imposed by virtue and in accordance with the provisions of the section only where a court convicts any person of an offence committed by the acceptance of any gratification in contravention of any provision of the Prevention of Corruption Act. No penalty under section 13 can be imposed where the court convicts a person under any of those sections of the Act where the acceptance by the offender of any gratification is not involved. On the second charge the accused in the present case was convicted not for accepting any gratification but for offering gratification. The provisions of section 13 were therefore irrelevant and inapplicable and the learned President was consequently in error when he invoked the section and imposed a penalty on the accused. In the circumstances therefore I set aside the order imposing the penalty.

Next I am of the view that when a court convicts any person of an offence committed by the acceptance of any gratification in contravention of any provision of the Prevention of Corruption Act and imposes the mandatory penalty under section 13 it has no power to order a term of imprisonment in default of payment of the penalty. Section 13 provides for the penalty to be recoverable as a fine so that the court may allow time for the payment of the penalty or direct payment of the penalty to be made by instalments or issue a warrant for the levy of the amount by distress and sale of any property belonging to the offender or direct the offender to be searched and any money found on him to be applied towards the payment of the penalty in accordance with section 283(i)(b)(1)(2)(3) and (5) of the Criminal Procedure Code. It must be stressed here that the provisions in section 283 of the Criminal Procedure Code which provide for terms of imprisonment in default of payment of fines have no application in the recovery of a penalty ordered under section 13 of the Prevention of Corruption Act. The penalty is to be treated as a fine but only to the extent and for the purpose of its *recovery* as such and is not to be treated as a fine in default of which a term of imprisonment may be imposed.

I think I should here refer to the case of *Lee Mun Foong* v. *Public Prosecutor*[1] because at first sight and on the face of it my decision on the construction and applicability of section 13 of the Prevention of Corruption Act would appear to be in conflict with that of the Federal Court in that case. In *Lee Mun Foong* v. *Public Prosecutor* the appellant was convicted in the Sessions Court under section 4(a) of the Prevention of Corruption Act, 1961 for accepting a gratification of $1,000 and was sentenced to two years' imprisonment. A trap had been laid in this case and the $1,000 were recovered after the appellant's arrest. His appeal to the High Court was dismissed and Abdoolcader J. after noting that the Sessions Court had failed to impose the mandatory penalty under

section 13 ordered the appellant to pay a penalty of $1,000 to the Anti-Corruption Agency. Counsel for the appellant had earlier submitted that a penalty under section 13 could be imposed only where the bribe money was not recovered and not in the instant case where the police recovered the full amount of $1,000. On the application on behalf of the appellant Abdoolcader J. then reserved a question of law for the decision of the Federal Court in the following terms —

"Whether the provisions of section 13 of the Prevention of Corruption Act, 1961 are applicable in every case of a conviction under the said Act or whether the application of section 13 is restricted only to instances where the money, the subject matter of the offence, has not been recovered."

And the answer of the Federal Court was —

"that the provisions of section 13 of the Prevention of Corruption Act, 1961 are applicable in every case of a conviction under the said Act and not restricted only to instances where money and indeed any other form of gratification, the subject matter of the offence, has not been recovered."

I do not for a moment believe that the Federal Court intended its answer to be as wide as it is to include "every case of a conviction under the said Act". Section 13 is clearly restrictive in its scope and application for it can apply only where a person is convicted of an offence committed by the *acceptance* of any gratification in contravention of any provision of the Prevention of Corruption Act. There are several sections prescribing offences under the Act which do not involve the *acceptance* by the offender of any gratification such as sections 3(b) and 4(b) which refer to offers of gratification and section 4(c) which relates to the giving or using of documents containing false statements with intent to deceive and mislead. Also there is section 10 which prescribes a number of offences none of which involves the acceptance of any gratification. There is every reason to believe that the Federal Court decision was really meant to cover those cases where a court convicts persons of offences committed by their acceptance of gratification and not every case of a conviction under the Prevention of Corruption Act. A close study of the judgment of Abdoolcader J. in the High Court and that of Wan Suleiman F.J. in the Federal Court bears this out. It would appear from these judgments that the High Court, the Federal Court and counsel in the case were all along thinking only of the case of a person convicted of an offence committed by the acceptance of gratification. That was in fact the position in the case with which they were dealing and the only issue which was being strongly argued was whether in such a case the provisions of section 13 would apply irrespective of whether or not the bribe money had been recovered. And having decided that section 13 applied the Federal Court gave its answer in terms of the question which the High Court had formulated and reserved for its decision without apparently realising that in the circumstances of the case the question as worded was wider than was ever intended. The question whether section 13 applies in every case of a conviction under any provision of the Prevention of Corruption Act or whether it applies only where a court convicts any person of an offence committed by the acceptance of any gratification in contravention of any provision of the Act was not argued or discussed at all either in the High Court or in the Federal Court and consequently no reasons were given by the Federal Court in deciding that section 13 applied in every case of a conviction under the Prevention of Corruption Act. Therefore it cannot be said that the decision of the Federal Court on this particular point to the effect that the provisions of section 13 are applicable in every case of a conviction under the Prevention of Corruption Act as stated in the answer to the question reserved constitutes the *ratio decidendi* of the case so as to become a binding precedent on this particular point.

On the next point, whether a term of imprisonment may be lawfully ordered in default of payment of a penalty imposed under section 13 of the Prevention of Corruption Act, Wan Suleiman F.J. in his judgment refers briefly to section 283 of the Criminal Procedure Code and observes that the penalty which section 13 prescribes

"shall be recoverable as a fine, enables the court instead of imposing a term of imprisonment in lieu (which is restricted by section 283(c) of the Criminal Procedure Code where the offence is punishable with imprisonment exceeding 2 years to only one quarter of the maximum term of imprisonment), to cause instead the accused to disgorge pecuniarily under section 283(b)(3) of the Criminal Procedure Code where by the issue of a warrant for the levy of the amount of the penalty by distress and sale of any property belonging to the accused the deterrent effect will be greatly increased."

From these remarks one might get the impression that in his Lordship's view a court has the power to order a term of imprisonment in default of payment of a penalty imposed under section 13 of the Prevention of Corruption Act. Here again I do not think that Wan Suleiman F.J. meant to give a considered opinion on this point which was not in issue and on which there was no argument or discussion in the proceedings. His Lordship's remarks were purely obiter and therefore not binding.

In all the circumstances therefore I think that it should be quite safe to say that in the case of *Lee Mun Foong* v. *Public Prosecutor* the only statement of law enunciated by the Federal Court and which has the force of a binding precedent is that the mandatory provisions of section 13 of the Prevention of Corruption Act are applicable in every case where a court convicts any person of an offence committed by the acceptance of any gratification in contravention of any provision of the Act and are not restricted to those of such cases as aforesaid where the gratification in money or in kind is not recovered.

Order accordingly.